



September 19, 2012

Michigan House of Representatives
Committee on Natural Resources, Tourism, and Outdoor Recreations

RE: Testimony on House Bill 5897 — Permit exemptions for Wetlands and Inland Lakes and Streams
Acts and Wetland Mitigation Rules

Dear Representatives:

Tip of the Mitt Watershed Council, on behalf of its 2,300 plus members, wishes to extend our concern with regards to House Bill 5897. HB 5897 would amend the permit exemptions within Michigan's Wetland and Inland Lakes, and Streams Acts and proposes changes to wetland mitigation rules. These amendments have far reaching impacts within our state affecting not only our natural resources, but other industries such as oil and gas drilling and motor vehicle licenses. As well, the bill would result in additional loss and degradation to our wetlands and jeopardize Michigan's assumption of the federal wetland program.

Michigan has a proud tradition of being one of only two states to administer Section 404 of the Clean Water Act (CWA). To keep the authority to administer Section 404, the state must maintain a program that is equivalent to the federal program administered by the Environmental Protection Agency.

The U.S. Environmental Protection Agency (EPA) conducted a comprehensive review of the state of Michigan's CWA section 404 permitting program, including the state's statutory and regulatory provisions governing the program as well as the State of Michigan's administration of the program.

Through the review, EPA found deficiencies in the legal authorities establishing the approved CWA section 404 program and in the program's administration. These deficiencies are identified in the Final Report of the U.S. Environmental Protection Agency's (EPA) review of the State of Michigan's Clean Water Act (CWA) section 404 program. Included in the Final Report are also corrective actions needed to address the deficiencies.

Some of the provisions included in HB 5897 directly correlate to the corrective actions required in the Final Report and recommended by the Wetland Advisory Council. We fully support making the necessary corrective actions that will ensure Michigan can maintain assumption of the 404 program.

However, broadening state exemptions beyond the specifications of the federal exemptions would reduce the current equivalency standards, therefore, putting the state's assumption in jeopardy. The proposed bill does exactly this and, therefore, we oppose House Bill 5897 as currently written.

We recommend that the following modifications be made to meet the federal requirements from the EPA, as well as to ensure that Michigan's natural resources and the programs that protect them are safeguarded:

- **Remove changes to Part 13**

Section 1307(2) requires the use of standards in Section 75 of the Administrative Procedures Act for the approval or denial of a permit. Section 75 of the Administrative Procedures Act applies to contested cases. Should the approval or denial of a permit be contested, then would it be prudent to apply the rules of evidence for a contested case. However, without the permit being contested, this provision exceeds what is needed to make a determination on a permit in an efficient and timely manner.

Language included for the basis of a denial, 1307(4)(C)(i) and 1307(4)(C)(ii), is ambiguous and needs to be removed. What does "product of reliable scientific principles and methods" mean? Likewise, what does "the decision has applied the principles and methods reliably to the facts" mean? What principles and methods are being referred to? Is this a more confusing and arbitrary way to state that the state must provide scientific information for the basis of denials? The inclusion of this provision provides no clarification nor enhances any programmatic implementation. Therefore, it should be removed.

Furthermore, Changes to Part 13 are broader than the Wetland Protection Act. The impetus for these amendments is an EPA audit of Michigan's administration of the federal 404 program as well as recommendations from the Wetland Advisory Council. As such, the amendments should stick solely to those areas impacted by the EPA review and not interfere with the implementation of other programs.

These proposed changes to Part 13 would affect the following:

- floodplain alteration permit
- permit for use of water in mining iron ore
- sewerage system construction permit
- vehicle testing license
- motor vehicle fleet testing permit
- restricted use pesticide dealer license
- agricultural pesticide dealer license
- license to manufacture or distribute fertilizer
- local soil erosion and sedimentation control permit
- solid waste disposal area construction permit
- solid waste disposal area operating license
- municipal solid waste incinerator ash landfill operating license amendment
- septage waste servicing license or septage waste vehicle license
- septage waste site permit
- inland lakes and streams project permit

- state permit for dredging, filling, or other activity in wetland
- dam construction, repair, or removal permit
- flood risk, high risk, or environmental area permit
- permit for dredging and filling bottomland
- permit for submerged log removal from Great Lakes bottomlands
- department permit for critical dune area use
- endangered species permit
- game bird hunting preserve license
- dog training area permit
- fur dealer's license
- game dealer's license
- charter boat operating permit under reciprocal agreement
- boat livery operating permit
- permit to take frogs for scientific use
- game fish propagation license
- game fish import license
- oil or gas well drilling permit
- brine, storage, or waste disposal well drilling or conversion permit or test well drilling permit
- ferrous mineral mining permit
- surface coal mining and reclamation permit or revision of the permit
- sand dune mining permit
- use permits for Michigan trailway
- sunken aircraft or watercraft abandoned property recovery permit
- Mackinac Island motor vehicle and land use permits
- buoy or beacon permit

The burdensome and vague requirements under the proposed changes would impact all of the industries above. The language has extremely broad implications and altering the permitting system for all of these industries would only serve to hurt Michigan's business and our economy.

- **Remove Part 301 changes or modify the proposed language to be consistent with Part 303**

The amendments put forth in Part 301 need to be consistent with the amendments proposed in Part 303 and this includes making sure the amendments meet the requirements put forth by the EPA. In order for the state to maintain authority to administer the 404 program, the state program must be the equivalent of Section 404 and Michigan Department of Environmental Quality (MDEQ) must continue to demonstrate its ability to administer the regulations as effectively as federal agencies. Many of the corrective actions identified by the EPA to address deficiencies in the current program included clarifying and modifying exemptions within Parts 303, Wetland Protection Act, and Part 301, Inland Lakes and Streams Act. The proposed language for Part 303 meets the EPA's requirements. However, the proposed language for Part 301 amendments fails to do so.

The amendments proposed in Part 301 need to be consistent with those proposed in Part 303 and meet EPA's requirements under the audit. Specifically:

- 30103(1)(d) needs to include that the maintenance of agricultural drains occurs only in areas of ongoing farming, silviculture, or ranching operations and that activities that bring

an area into farming, silviculture, or ranching use or that convert an area to another use are not part of an established ongoing operation.

- 30103(1)(g), maintenance of drains, needs to include that maintenance of drains does not include any modification to the character, scope, or size of the drain as of January 1, 2013. To meet this requirement, “reshaping of the side slopes” and “drain realignments” need to be removed. One EPA requirement under the audit was for the MDEQ to promulgate rules under Part 301 that will define the terms “maintenance” and “improvement” in a manner consistent with the federal definition of the term maintenance. Federal law clearly prohibits activities which result from altering the original contours of a drainage ditch, as this is deemed an improvement to the drainage ditch or, in effect, a construction, rather than maintenance of the ditch that previously existed. By authorizing “reshaping of side slopes” and “drain realignment,” Part 301 appears to allow alteration of the widths and bottoms of existing drains, which would render this statutory provision less stringent than the Clean Water Act section 404 and its regulations. Any provision that is less stringent jeopardizes the state assumption of the 404 program.

- **Remove exemptions for “utility lines” in Part 303, both 30305(2)(k) and 30305(2)(l)**

The review of the state program indicated concern with respect to exemptions for utility lines. The concern is that the state program is broader because the state exempts the activities whereas the federal government requires a Nationwide Permit for the construction, maintenance, and repair of utility lines. To maintain the equivalent, the state needs to require a permit for such activities. The permit exemption is not equivalent to the federal permitting system because a discharger must give advance notice to the Corps if the work entails a certain aerial extent and because the permit establishes specific limitations on the manner of the work’s performance. Therefore, the exemptions would be broader than the federal 404 program and is not allowed by the EPA for the state to maintain assumption of the program.

- **Remove provisions that allow for flexibility and a reduction in mitigation ratios, 303011d(5)(b) and 303011d(5)(c), respectively**

The purpose of mitigation is to replace the lost functions and values provided by wetlands and waterways from permitted activities. This includes a requirement to ensure no net loss of wetlands. Allowing for flexibility in ratios and a reduction in mitigation ratios will serve to hinder the state’s ability to ensure no net loss. In fact, such a policy will guarantee a net loss. Quantity and quality of the proposed mitigation must adequately compensate for the wetland area lost through development.

The use of a mitigation bank is not a justification for reduction in mitigation ratios. Mitigation banks raise special problems of their own. More often than not, the promised mitigation is never realized and sustainable wetlands that match the functions and productivity of natural wetlands are not built. Thus, any broad use of mitigation banks could lead to a net loss of wetland habitat. Moreover, the creation of mitigation banks will reduce the barriers to filling wetlands and may even encourage projects, as bank sponsors seek to recover their costs.

- **Remove provision allowing department to enlarge size of ecoregions in 303011d(6)(a)**

Ecoregions denote areas of general similarity in ecosystems and in the type, quality, and quantity of environmental resources. Ecoregion boundaries are determined by examining patterns of vegetation, animal life, geology, soils, water quality, climate, and human land use, as well as other living and non-living ecosystem components. Ecoregions provide for a more holistic approach to resource management. For example, instead of managing for individual animal and plant species, the ecoregion approach is to manage an entire ecosystem. The geology, physiography, vegetation, climate, soils, land use, wildlife, and hydrology do not change with development or mitigation banks. Therefore, the ecoregion should not be enlarged for mitigation bank areas. The department should not be able to arbitrarily determine ecoregions; rather, the ecoregions should remain as they are based upon coordinated scientific methods.

To summarize, Tip of the Mitt Watershed Council recommend the following provisions for a final bill:

- Remove changes to Part 13
- Remove Part 301 changes or modify the proposed language to be consistent with Part 303.
- Remove exemptions for “utility lines” in Part 303, both 30305(2)(k) and 30305(2)(l)
- Remove provisions that allow for flexibility and a reduction in mitigation ratios, 303011d(5)(b) and 303011d(5)(c), respectively.
- Remove provision allowing department to enlarge size of ecoregions in 303011d(6)(a).

We appreciate the opportunity to offer comments to ensure activities within the state are taken with careful consideration to protect the health of our surface waters and Great Lakes, and the citizens and visitors who rely upon those water resources. We urge you to give careful consideration to the comments provided and incorporate them into a bill that will ensure the state maintains administration of the 404 program and protects environmental quality.

Thank you for the opportunity to provide you with these comments. Please feel free contact Jennifer McKay with questions or concerns regarding the comments provided at 231.347.1181 or jenniferm@watershedcouncil.org.

Sincerely,



Jennifer McKay
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Tip of the Mitt Watershed Council